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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re GLORY R., et al., Persons Coming
Under the Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

K.R.,

Defendant and Appellant;

S.R.,

Defendant and Respondent.

E039302

(Super.Ct.No. SWJ004068)

OPINION

APPEAL from the Superior Court of Riverside County. Robert W. Nagby,
Temporary Judge,¹ and Becky Dugan, Judge.² Affirmed.

¹ Pursuant to article VI, section 21 of the California Constitution.

² Commissioner Nagby presided over the jurisdictional hearing and made the challenged jurisdictional orders.

[footnote continued on next page]

Leslie A. Barry, under appointment by the Court of Appeal, for Defendant and Appellant.

Joe S. Rank, County Counsel, and Julie Koons Jarvi, Deputy County Counsel, for Plaintiff and Respondent.

Diana W. Prince, under appointment by the Court of Appeal, for Defendant and Respondent.

Konrad S. Lee, under appointment by the Court of Appeal, for Minors.

The juvenile court removed Glory and Joy R. from the custody of their mother, K.R. (mother) and placed them with their father, S.R. (father), based in part on a finding that the mother had failed to protect them from a risk of being sexually abused by one Lightning Amen. Eventually, it granted custody to the father and ordered that the dependency be terminated.

The mother was affiliated with a religious “community,” “fellowship,” or “family” that revolved around Amen. She regarded Amen as God and had taught her daughters to do so, too. When Joy was first interviewed, she indicated that Amen had sexually abused her, Glory, and a third girl. Glory and the third girl, however, denied any sexual abuse, and, in subsequent interviews, so did Joy.

[footnote continued from previous page]

Judge Dugan presided over the six-month review hearing and made the challenged “exit orders” (i.e., orders for custody and visitation upon termination of the dependency).

The mother has appealed, contending that the jurisdictional allegations of the petition were insufficient, or, alternatively, that there was insufficient evidence to support jurisdiction. She also contends that the juvenile court erred by refusing to return the girls to her custody upon termination. The father -- even though he was given custody and has not appealed -- supports the mother's contentions. Moreover, the girls themselves, through their appellate counsel, have asked to be returned to the mother.

The mother claims this case "brings to light the dangerousness of practicing a religion[] that is not in the mainstream" Not so. She does not claim that her religion required her to let Amen sexually abuse her daughters. Quite the contrary -- she claims she had no reason to believe that Amen was sexually abusing them, and she would obey a court order forbidding him to contact them.

We will conclude that we can no longer review the jurisdictional finding of sexual abuse, because the mother did not appeal from the jurisdictional/dispositional orders; alternatively, we will conclude that this finding is supported by substantial evidence. We will further conclude that the juvenile court did not abuse its discretion by finding that an award of custody to the father, rather than to the mother, was in the girls' best interests. Hence, we will affirm.

I

ALLEGATIONS AND EVIDENCE REGARDING JURISDICTION

The mother contends the jurisdictional allegations of the petition were insufficient and/or there was insufficient evidence of jurisdiction. Anticipating the response that her

trial counsel waived these issues, she also contends that her trial counsel rendered ineffective assistance.

A. *Factual and Procedural Background.*

1. *The Allegations of the Petition.*

The petition, as amended, alleged jurisdiction based on failure to protect (Welf. & Inst. Code, § 300, subd. (b)) and sexual abuse (Welf. & Inst. Code, § 300, subd. (d)), in that: “Parents/Mother reasonably should have known that their children were at risk of being sexually abused based on the finding by the Juvenile Court that other children in close contact with Lightning Amen had been sexually abused by him, as well as based on his conviction for Penal Code section 647.6(a). Knowing this, the parents/mother allowed contact between the children and Lightning Amen, placing their children at risk of possible harm.”

2. *Social Worker’s Reports in This Case.*

The social worker’s reports admitted into evidence at the jurisdictional hearing showed the following facts.

The mother and the father were married but separated. Glory and Joy lived with the mother, in a van. Another woman and her daughter, Grace L., lived with them. All three girls had grown up together. Other people lived on the same property. The father lived a few miles away.

On January 3, 2005, the Department of Public Social Services (the Department) received a report that Glory, Joy, and Grace had said that Amen made them touch his “privates.” According to the reporting party, Glory, Joy, and Grace lived in a

“compound” with Amen; he was their “God.” The girls said they were afraid of him. They also said their mothers and other people in the compound were aware of the sexual abuse, “but do not say anything about it.”

Amen had “a long criminal history,” including a conviction for annoying or molesting a child. (Pen. Code, § 647.6, subd. (a).)

A social worker conducted separate interviews with Glory and Joy. Joy was six years old, going on seven. She said that Amen was “her ‘God’ and she obeys whatever he tells her to do.” He came to visit her every day. She said, “Amen has touched me on my private parts on the outside of my clothes.” When asked if he had ever touched her without her clothes on, she said, “Amen has rubbed my hands, legs, and skin all over my body while my mom and other people have watched.” She had seen Amen touching Glory and Grace on their private parts. When asked if anyone told her not to tell about Amen touching her, she said, “My mom told me if they ask question[s] . . . to say ‘No’ to everything.” She was afraid she was going to get into trouble because she had disobeyed.

Glory was eight years old. She said that Amen was like a grandfather to her. She visited him every day after school. He had a “community” consisting of “12 or more people who share different houses on his property.” When people disobeyed him, they were asked to leave the community. Glory denied that Amen or anyone else had touched her private parts or asked her to touch their private parts. She said “she is not afraid of . . . Amen because he is her ‘God’ and would never do anything to hurt her.”

When a social worker interviewed the mother, she said that Amen was her “[b]est [f]riend” and “lives his life solely for God.” She denied that she considered him to be

God. She and the father were both part of Amen's "community." "[A]s many as fifty people will gather together at Lightning Amen's home and have meals together because they all consider themselves '[o]ne big family and this is our way of life.'"

The mother said " . . . Amen would never sexually abuse any children because '[h]e isn't that type of man.'" She added, "All of these vicious rumors are lies. Amen warned me that this might happen." "None of this is true. It is the outside world telling lies about Amen again!"

Next, the social worker interviewed the father. He said Amen was his friend. He also said, "I do not believe any of this is true." He added, "I have a good relationship with my daughters . . . , and I would know if something like this was going on."

Meanwhile, the Department had also received a report concerning a girl named Shelley Y. Shelley told her social worker that Amen was "having sex" with Glory and Joy.

The Riverside Child Assessment Team (RCAT) conducted separate interviews with Glory and Joy. Joy identified Amen as a "person" and then as someone "who comes around and talks to people." When asked if "anything had ever happened to her on" her private parts, "she displayed . . . a concerned, nervous, uncomfortable expression . . . and said, 'Not that I remember of.'" She said Amen had never asked her to touch his private parts.

Glory identified Amen as her "grandpa." When asked why she was in foster care, she said "Marie" had reported that Amen had touched her private parts, "but he really didn't." When asked if she ever had a problem with Amen or if he had ever done

anything she was uncomfortable with, she said, “No.” She said no one had touched any part of her body. When asked if Amen had ever asked her or someone else to “do something” or to touch him, she said he had not. She said she never spent time alone with Amen.

About a week later, a different social worker interviewed Glory and Joy. Joy said Amen was “nice.” She called him “[G]randfather.” She denied that he had ever made her uncomfortable or scared. Glory denied that Amen had touched her inappropriately. She believed a woman named Marie had started everything by getting drunk, calling the police, and telling them that Amen had touched her daughters’ private parts.

A social worker interviewed the father again. He repeated that he did not believe Amen had sexually abused his daughters, because Amen was never alone with them. He knew that Amen had been accused of molesting other children, but those allegations were not true; the children who had made them were lying and “very problematic.” Also, those children had continued to see Amen. He did not think the allegations had against Amen resulted in a criminal conviction. He had known Amen for about 15 years and found him to be a “good Christian man.”

The RCAT interviewed Grace about two weeks after it interviewed Glory and Joy. Grace was seven years old. She said Amen was “nice” and “helps my mom.” She said nothing had happened with Amen that she did not like, but added, “I’m pretty sure. I don’t have a good memory. . . . I don’t really remember if he did that.” When asked if anyone had done anything to her private parts, she said, “Not that I remember.” She said

her mother would not let anything happen, “but something probably already has happened.”

A psychologist had evaluated both parents. The mother told him “that the family that made the allegations are the same ones who made false allegations in the past” The psychologist accepted the parents’ claims that they did not consider Amen to be God. He also concluded that, while both parents respected Amen and did not believe he was a molester, neither of them would leave the children alone with him. He also believed they would obey a court order not to let the children have any contact with Amen.

3. *Social Worker’s Reports in the Grace L. Case.*

The social worker’s report for the jurisdictional/dispositional hearing incorporated by reference all of the reports filed in a related case, *In re Grace L.*, case No. SWJ004069 (*Grace L.* case). Neither the mother nor any of the other parties objected to this. Moreover, the attorney for the mother in this case was also an attorney for one of the parents in the *Grace L.* case, and therefore she had copies of those reports. Both cases were assigned to Commissioner Nagby. In fact, Commissioner Nagby held a hearing in *Grace L.* only minutes before the jurisdictional/dispositional hearing in this case. Under these circumstances, the juvenile court could properly consider the evidence in those reports.³ The reports in the *Grace L.* case showed the following.

³ We hereby take judicial notice of all social worker’s reports filed in the *Grace L.* case on or before the date of the jurisdictional hearing in this case. (Evid. Code, §§ 452, subd. (d)(1), 459.)

The original report, on January 3, 2005, had indicated that Amen was sexually abusing not only Glory and Joy, but also Grace. When a social worker interviewed her, Grace said she lived in “a place where there are lots of people and they help each other.” They all “believe that . . . Amen is God and that they all should obey whatever he says.” She seemed terrified that her mother might go to jail, but when asked what her mother would go to jail for, she said she did not remember. She kept saying, “[S]omething bad has happened, but I don’t remember.”

A social worker then interviewed Grace’s mother. She claimed, “This is all a lie from Marie, who got her children taken away from her and now she wants to make our life miserable.” About a year earlier, she explained, three other girls had disclosed that Amen had molested them. Grace’s mother thought they did this because they disliked Amen; he had had a “relationship” with their mother and “would not let them do whatever they wanted to do.” Grace’s mother “d[id] not believe that . . . Amen could do anything wrong to Grace because he loves her very much.” She also said “she believes that . . . Amen has the Spirit of God in him and that she did not believe that he has done anything wrong.”

The social worker then consulted with another social worker, who was handling the case of three girls who had been molested by Amen in 2001. Those girls had recently told their social worker that “Amen is having sex with the three younger children in the camp and . . . the mothers have been present and don’t say anything about it.”

Grace’s mother and the mother in this case met with the social workers. At that meeting, Grace’s mother admitted that she believed Amen was God. Grace’s mother

added that she had “a weight on her shoulders” because she had lied in her previous interview. She had told Grace not to say that Amen was God, “because I knew that you would not believe her. . . . I told her that if she was to tell the truth to you, I would go to [j]ail.”

A social worker asked if Amen had touched the girls’ private parts. Grace’s mother replied, “There is not a part of their bodies that he has not kissed and he has not touched! But . . . it is not in a sexual manner, it is out of love. . . . For God, there are no bounds” When asked if she had seen Amen touch the girls’ private parts, she replied, “The way your world sees things is different than in our world. . . . [T]o be with God, you have leave all of your possessions, including your loved ones, just like Jesus Christ says.”

Grace’s mother, saying “Lightning Amen does this,” then kissed the mother in this case on the lips and “grabbed” her breasts. Grace’s mother explained, “[T]his is the way Lightning Amen could be showing his affection” The mother in this case then said she agreed with what Grace’s mother had said. “[S]he apologized for not telling . . . the truth at [her] initial interview.”

4. *Social Worker’s Reports in the Shelley Y. Case.*

Attached to one of the social worker’s reports in the *Grace L.* case were various social worker’s reports and other documents relating to *In re Shelley Y.*, case No. SWJ000004. These documents showed the following.

Marie (also known as K.M.) was a follower of Amen. She, too, believed he was God. She had three daughters (the Y. girls), including Shelley Y. In December 2001, the

Y. girls accused Amen of touching them inappropriately and of telling them, “Take your clothes off and get in bed with [me].” As a result, they were detained, and the Department filed a dependency petition concerning them. In January 2002, the juvenile court sustained allegations that Amen had sexually abused Shelley and that Marie had failed to protect all three girls from a risk of sexual abuse by Amen. In February 2002, the juvenile court issued a restraining order forbidding Amen to contact the Y. girls. In February 2003, the Y. girls were returned to Marie’s custody, and their dependency was terminated.

Meanwhile, Amen was charged with three counts of annoying or molesting a child. (Pen. Code, § 647.6, subd. (a).) In August 2002, pursuant to a plea bargain, he pleaded guilty to one count of annoying or molesting a child; the other two counts were dismissed.

On January 3, 2005, a social worker interviewed the Y. girls separately. Two of them said that, at a recent birthday party, Glory, Joy, and Grace had disclosed that Amen was sexually abusing them. All three of the Y. girls also said that Marie had allowed Amen to be around them, in violation of the restraining order. Hence, the Y. girls were detained, and their dependency was reactivated.

When a social worker interviewed Marie, she said Glory and Joy had disclosed to her that Amen had touched their private parts “many times”; Glory also told her that “Amen had his fingers in her.”

5. *The Jurisdictional/Dispositional Hearing.*

At the jurisdictional/dispositional hearing, both parents submitted on the social worker's reports. The juvenile court found that the allegations of the petition were true and that it had jurisdiction based on both failure to protect and sexual abuse.

It also found that the children could not be returned to the mother without a substantial danger to their well-being. It therefore removed them from her custody and placed them with the father. (See Welf. & Inst. Code, § 361.2.) It allowed the mother supervised visitation. It ordered that both parents be provided with reunification services. Neither parent filed a notice of appeal from these orders.

B. *Analysis.*

1. *The Allegations of the Petition.*

As noted, the mother contends the petition failed to state a cause of action. We reject this contention, for four distinct and alternative reasons.

First, the mother forfeited this contention by failing to appeal from the jurisdictional/dispositional orders. "If an order is appealable, . . . and no timely appeal is taken therefrom, the issues determined by the order are res judicata. [Citation.]" (*In re Matthew C.* (1993) 6 Cal.4th 386, 393.)

Second, the mother additionally forfeited this contention by failing to raise it at the trial level. (*In re Athena P.* (2002) 103 Cal.App.4th 617, 626-628 [Fourth Dist., Div. Two].) She urges us to follow *In re Alysha S.* (1996) 51 Cal.App.4th 393 [Third Dist.], which held that the failure of the petition to state a cause of action may be raised for the first time in an appeal from the jurisdictional/dispositional orders. (*Id.* at p. 397.)

However, in *Athena P.* (which the mother does not cite), this court criticized the reasoning in *Alysha S.* and refused to follow it. (*Athena P.*, at pp. 626-628.) Other courts have similarly refused to follow *Alysha S.* (*In re James C.* (2002) 104 Cal.App.4th 470, 479-481 [Second Dist., Div. Five]; *In re S.O.* (2002) 103 Cal.App.4th 453, 459-460 [Fourth Dist., Div. One]; *In re Shelley J.* (1998) 68 Cal.App.4th 322, 328-329 [Sixth Dist.].) We therefore decline to follow it here.

Third, regardless of whether the mother raised this contention at the trial level, any error was rendered moot or harmless by the jurisdictional hearing. “While a failure to state a cause of action may be raised at anytime, during trial or appeal, reversal of a judgment on that ground is justified and required only if the error resulted in a miscarriage of justice. [Citations.]’ [Citation.] ‘[E]ven though a complaint is defective in some particular, if the case is tried on the theory that it is sufficient and evidence accordingly is received without objection, the unsuccessful party cannot later effectively contest the sufficiency of the pleading. [Citations.]’ [Citation.] . . . [¶] [The mother] does not claim the petition gave her prejudicially inadequate notice of the factual allegations against her. If the evidence at the jurisdictional hearing was insufficient, [she] can seek reversal on that ground. But if the evidence was sufficient to support the juvenile court’s findings, any failure of the petition to state a cause of action became harmless error.” (*In re Athena P.*, *supra*, 103 Cal.App.4th at pp. 627-628, quoting *County of Riverside v. Loma Linda University* (1981) 118 Cal.App.3d 300, 319-320 and *McClure v. Donovan* (1949) 33 Cal.2d 717, 731-732.)

Fourth and finally, the petition did state a cause of action. It alleged that the parents knew or should have known that (1) a juvenile court had found that Amen had sexually abused other children, and (2) Amen had been convicted of annoying or molesting a child. It further alleged that they therefore knew or should have known that allowing contact between Amen and the children placed the children at risk of sexual abuse. The juvenile court has jurisdiction based on sexual abuse if “the parent . . . has failed to adequately protect the child from sexual abuse when the parent . . . knew or reasonably should have known that the child was in danger of sexual abuse.” (Welf. & Inst. Code, § 300, subd. (d).) The petition plainly alleged facts supporting such jurisdiction.

Similarly, the juvenile court has jurisdiction based on failure to protect if “there is a substantial risk that the child will suffer[] serious physical harm . . . as a result of the failure or inability of his or her parent . . . to adequately supervise or protect the child” (Welf. & Inst. Code, § 300, subd. (b).) Assuming, without deciding, that the petition failed to allege a cause of action under this subdivision, the error was harmless, because the petition did properly allege a cause of action based on sexual abuse.

The mother argues that the parents were “charged [with] having knowledge of a confidential dependency proceeding[, k]nowledge which they could not legally have. ([Welf. & Inst. Code,] § 827.)” Under Welfare and Institutions Code section 827, a juvenile case file is confidential, but the information contained in the file is not ipso facto confidential. In any event, people do things all the time that they are not legally allowed

to do. The mother also argues that, as a factual matter, she did not have such knowledge. This is irrelevant, however, to the sufficiency of the petition.

2. *The Evidence to Support Jurisdiction.*

The mother contends there was insufficient evidence to support the jurisdictional findings.

Once again, the mother forfeited this contention by failing to appeal from the jurisdictional/dispositional orders. However, we do not mean to imply that this contention, if not waived, would be meritorious. There was ample evidence that the mother knew or should have known that Glory and Joy were at risk of being sexually abused by Amen and had failed to protect them.

There was evidence that Amen had sexually abused the Y. girls -- the Y. girls said so, the juvenile court had sustained such an allegation, and Amen had pleaded guilty to annoying or molesting a child. This crime requires “conduct ““motivated by an unnatural or abnormal sexual interest”” in the victim [citation].” (*People v. Lopez* (1998) 19 Cal.4th 282, 289, quoting *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1127.) Both parents knew that the Y. girls had been removed from Marie’s custody based on claims that Amen had sexually abused them. Admittedly, they did not believe the Y. girls’ claims. The juvenile court, however, could reasonably find that they refused to believe the Y. girls only because they regarded Amen as God. It could also find that both parents failed to make a reasonable inquiry into the truth of the Y. girls’ allegations.

At the meeting with the social workers, Grace’s mother demonstrated how Amen “show[s] his affection” by grabbing the mother’s breast and kissing her on the lips.

When asked if Amen had touched the girls' private parts, she replied, "There is not a part of their bodies that he has not kissed and he has not touched!" When asked if she had *seen* Amen touch the girls' private parts, she indirectly admitted that she had. She also admitted telling Grace "that if she was to tell the truth to you, I would go to [j]ail." The mother in this case agreed with everything Grace's mother had said.

According to Marie and two of the three Y. girls, Glory, Joy, and Grace had all disclosed that Amen was sexually abusing them. According to one or more of the Y. girls, the younger girls' mothers had been present during the sexual abuse.

When Joy was first interviewed, she said Amen had touched her private parts, albeit when she had clothes on, and she had seen him touch the private parts of Glory and Grace; also, when she had no clothes on, he "ha[d] rubbed [her] hands, legs, and skin all over [her] body while [her] mom and other people have watched." Joy was afraid she was going to get into trouble because she had disobeyed her mother's orders to deny everything. Accordingly, in all subsequent interviews, she denied any sexual abuse. However, in one interview, when asked if sexual abuse had occurred, "she displayed . . . a concerned, nervous, uncomfortable expression . . . and said, 'Not that I remember of.'"

Glory and Grace also denied any sexual abuse. Grace, however, like Joy, tended to couch her denials in terms of a lack of memory. In her first interview, she kept saying, "[S]omething bad has happened, but I don't remember." She was afraid her mother would go to jail, but she claimed not to remember why. In her RCAT interview, she said she was "pretty sure" nothing had happened with Amen that she did not like, but she added, "I don't have a good memory. . . . I don't really remember if he did that." When

asked if anyone had done anything to her private parts, she said, “Not that I remember.” She said her mother would not let anything happen, “but something probably already has happened.” Thus, the juvenile court could reasonably find that Joy’s recantation and the other two girls’ denials were not credible.

Finally, the mother said, “Amen warned me that this might happen” -- presumably meaning that he would be accused of molesting her daughters. Once again, it appears that, rather make a reasonable inquiry, she chose to assume that he was not.

The mother relies on the psychologist’s favorable evaluation. However, she lied to him -- she told him, falsely, that she did not consider Amen to be God. He then relied on this falsehood in concluding that she would be able to protect the girls from Amen. The juvenile court could therefore discount the psychologist’s conclusions.

The mother also argues that there was no evidence that either she or the father actually knew that Amen had been found to have sexually abused the Y. girls. The Department concedes that: “The reports submitted at the jurisdictional hearing do not contain evidence that the parents actually had knowledge that the juvenile court made a finding that other children . . . had been sexually abused by [Amen], or that they had knowledge that Amen was convicted under Penal Code section 647.6(a).” *Actual* knowledge, however, was not required; all that was necessary was evidence that the parents “knew *or reasonably should have known* that the child was in danger of sexual abuse.” (Welf. & Inst. Code, § 300, subd. (d), italics added.) The father told the social worker that Amen had been accused of molesting the Y. girls. The mother similarly told the psychologist that the Y. girls had “made false allegations in the past . . .” It was

fairly inferable that both parents had remained willfully ignorant of the actual results of the Y. girls' allegations.

Moreover, while the petition was premised on the prior findings regarding the Y. girls, evidence was introduced, without objection, that the parents knew or should have known that the girls were in danger of sexual abuse for additional reasons. When Joy was first interviewed, she said, "Amen has rubbed my hands, legs, and skin all over my body while my mom and other people have watched." When asked if anyone told her not to tell about Amen touching her, she said, "My mom told me if they ask question[s] . . . to say 'No' to everything." According to Marie and her daughters, Glory, Joy, and Grace said their mothers were present when sexual abuse occurred. Grace's mother indicated to social workers that she had seen Amen touch the girls all over their bodies, including their private parts, although she denied that this was sexual; the mother in this case agreed with everything she said.

We therefore conclude that there was sufficient evidence to support the juvenile court's finding that it had jurisdiction based on sexual abuse. (Welf. & Inst. Code, § 300, subd. (d).) "Having concluded there was substantial evidence to support the court's determination that the minor[s] came within the provision of section 300, subdivision ([d]), we need not address appellant's claim that there was insufficient evidence to find jurisdiction under section 300, subdivision ([b]). [J]urisdiction may be based on any single subdivision." (*In re Shelley J.*, *supra*, 68 Cal.App.4th at p. 330.)

3. *Ineffective Assistance of Counsel.*

As a fallback argument, the mother contends her trial counsel rendered ineffective assistance by failing to challenge the jurisdictional allegations or evidence and by failing to file an appeal from the jurisdictional/dispositional orders.

We may assume, without deciding, that the mother did not forfeit her ineffective assistance of counsel claim by failing to raise it in an appeal from the jurisdictional/dispositional orders. (See *In re S.D.* (2002) 99 Cal.App.4th 1068, 1079-1082; but see *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1151-1160.) Even if so, the mother bears the burden of demonstrating that (1) “counsel failed to act in a manner to be expected of reasonably competent attorneys practicing in the field of juvenile dependency law,” and (2) “the claimed error was prejudicial,” meaning “it is ‘reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.’ [Citation.]” (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1667-1668, quoting *People v. Watson* (1956) 46 Cal.2d 818, 836.)

“Reviewing courts will sustain ineffective assistance of counsel claims on appeal “ . . . only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission.” [Citation.]’ [Citation.]” (*In re Merrick V.* (2004) 122 Cal.App.4th 235, 255, quoting *People v. Zapien* (1993) 4 Cal.4th 929, 980.) Here, the mother’s trial counsel could have chosen not to challenge the sufficiency of the petition because she believed that, if she did, the Department would only amend the petition to make it even stronger. Likewise, she could have chosen not to challenge the sufficiency of the evidence because she believed the Department would then bring in

even stronger evidence. For the same reasons, she could have chosen not to file an appeal.

In any event, as we held in part I.B.1, *ante*, the jurisdictional allegations were sufficient. And, as we held in part I.B.2, *ante*, there was sufficient evidence to support jurisdiction. Accordingly, the mother cannot show either deficient representation or prejudice.

II

AWARD OF CUSTODY TO THE FATHER

The mother contends the juvenile court erred by awarding sole physical custody to the father.

A. *Additional Factual Background.*

The following evidence was before the juvenile court at the six-month review hearing.

Glory and Joy were living with their father in Hemet. They were happy. They had an “appropriate bond” with both the mother and the father. The mother was visiting them weekly, for one to three hours at a time. They looked forward to the visits. They “really miss[ed] their mom and [didn’t] understand why she [couldn’t] live with them.”

The girls attended “Daughters United” weekly, “to cover issues relat[ed] to victims of sexual abuse.” According to their “facilitator,” “both girls have been active participants during sessions and appear to be attempting to process and integrate their history of sexual victimization. [B]oth children are consistent in their statements of sexual abuse.”

When the social worker asked the girls if they wanted to see Amen, “they both stated excitedly, ‘Yeah.’” According to the father, they “frequently” asked to see Amen. Because a restraining order was in effect, he had not let them. If the restraining order were lifted, he would let them see Amen, but he would supervise the visits. He told a social worker “he will not jeopardize losing the girls by going against the restraining order.”

Both parents had successfully completed their reunification services plans. According to a psychological evaluation of the father, he did not believe that Amen had molested the girls. He respected Amen and considered him a friend. He denied that Amen or anyone else in the community was “treated as if they were God.” The evaluation concluded that the father “is no danger to his children and . . . he would prevent them from being in a situation where they could be molested.”

According to a psychological evaluation of the mother, she, too, did not believe that Amen had molested the girls. She described Amen as “her best friend” and “like a father to her.” She denied believing that he was God. When asked what she would do if the molestation allegations were true, she said she did not know. However, she appeared to be a strong person and “a protective mother . . . primarily concerned with the welfare of her children” The evaluator believed that, if she was ordered not to let Amen contact the children, she would not. The evaluator concluded: “[R]egardless of the truth of the allegations, I see no bar [to] her children being back in her care. She certainly needs to re-assess her involvement in that community, given that there are problems there, or these allegations would not have surfaced, true or not.”

In response to a question about how she had benefited from reunification services, the mother wrote a letter stating: “. . . I cannot benefit from an utterly corrupt and evil system. One under the guise of the child[']s best interest, when there is no love at all for the children or the families of the children. It is all about dollar signs to you You who would condem[n] a righteous man with no proof or any investigation. You who abduct innocent children from loving families where no harm has ever come to them. Then place them in a foster care system with people who actually despise them. You then send my children to classes which have sexualized them. These children who before any of this were completely innocent of any thought, word or deed of a sexual nature. You people have traumatized God’s children and caused separation in a home where there was peace before. Creating confusion and unhappiness where there was joyous security. [¶] The DPSS/CPS are the ones who have abused and neglected these children. You refuse to hear the truth. It is all about your agenda which is based on lies. You make life[-]changing decisions from biased opinions and false accusations/allegations.”

In the social worker’s opinion, this letter showed that the mother had failed to benefit from reunification services and was in “denial relating to the circumstances of this case.”

B. *Additional Procedural Background.*

At the six-month review hearing, the maternal grandmother commented: “[The mother] is a very legal person. And if [she] could say . . . religiously I believe in Lightning Amen, but if the Court tells me I cannot let my children be around him, she

would abide by that [S]he would abide by that because that's how much she loves her children."

The juvenile court disagreed: "I don't think she has any respect for the Court's processes, the system or [S]ocial [S]ervices. She makes it very clear in the attached letter that she has none of that respect. [¶] . . . I think she responds to a higher authority and my authority is meaningless."

This discussion followed:

"THE MOTHER: [L]ike . . . my mother said, it is true that if I said that I wouldn't bring the kids to see Amen, I wouldn't because I do answer to a higher authority and that's true. If I'm told not to do something I have to abide by that.

"THE COURT: All right.

"THE MOTHER: I know you guys. I know you don't believe what I say, but --

"THE COURT: You know[,] your letter is just so full of anger that it's very difficult for me to think that you're really going to follow anything that we say.

"THE MOTHER: Well, . . . that's because everything you guys have said has ended up not being followed through with.

"THE COURT: It's entrenched with anger. Your kids are with their dad and not in the foster system. You see them all the time. I think that's a pretty good result, but --

"THE MOTHER: How is that a good result? They were living with me. I raised them.

"THE COURT: It's not the result you want, but they're not in the foster system.

“THE MOTHER: It’s not the result they want. [¶] Have you asked them what they want?

“THE COURT: We try not to put the kids in the middle of this. They have two adult parents.”

At the end of the six-month review hearing, the juvenile court gave the father sole physical custody, allowed the mother supervised visitation, and ordered that its jurisdiction be terminated. (See Welf. & Inst. Code, § 362.4.) The mother filed a timely notice of appeal.

C. *Analysis.*

The juvenile court cannot remove a child from a parent’s physical custody unless it makes one of several alternative findings, including -- as in this case -- that there would be a substantial danger to the child’s well-being if he or she were returned home. (Welf. & Inst. Code, § 361, subd. (c)(1).)

If the juvenile court does remove the child, it must place the child with any noncustodial parent who is seeking custody, “unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child.” (Welf. & Inst. Code, § 361.2, subd. (a).)

If the juvenile court places the child with a noncustodial parent, under Welfare and Institutions Code section 361.2, subdivision (b), as it read at the time of the disposition al hearing, the court may do any of the following:

“(1) Order that the parent become legal and physical custodian of the child. The court may also provide reasonable visitation by the noncustodial parent. The court shall then terminate its jurisdiction over the child. . . .

“(2) Order that the parent assume custody subject to the supervision of the juvenile court. In that case the court may order that reunification services be provided to the parent or guardian from whom the child is being removed, or the court may order that services be provided solely to the parent who is assuming physical custody in order to allow that parent to retain later custody without court supervision, or that services be provided to both parents, in which case the court shall determine, at review hearings held pursuant to Section 366, which parent, if either, shall have custody of the child.” (Former Welf. & Inst. Code, § 361.2, subd. (b)(1)-(2); see now *id.*, subd. (b)(1)-(3).)

If -- again, as in this case -- the juvenile court chooses the second option, then six months later it must hold a review hearing. At that hearing, if both parents have been receiving reunification services, it must determine which parent should have custody. (Former Welf. & Inst. Code, § 361.2, subd. (b)(2); see now *id.*, subd. (b)(3); see also Welf. & Inst. Code, § 366, subd. (a); *In re Sarah M.* (1991) 233 Cal.App.3d 1486, 1501, disapproved on other grounds in *In re Chantal S.* (1996) 13 Cal.4th 196, 204.) Finally, if it decides that the child should stay with the formerly noncustodial parent, it must “determine whether supervision is still necessary.” (Welf. & Inst. Code, § 366.21, subd. (e).) If not, it must terminate its jurisdiction and award permanent custody to the formerly noncustodial parent. (Welf. & Inst. Code, §§ 361.2, subd. (b)(1), 366.21, subd. (e).)

Ordinarily, once the child has been removed from a parent's custody, there is a presumption at every subsequent review hearing that the child should be returned to that parent; the juvenile court can refuse to return the child if, and only if, it finds a substantial risk of detriment. (Welf. & Inst. Code, §§ 366.21, subds. (e), (f), 366.22, subd. (a).) However, if the child has been placed with a formerly noncustodial parent, there is no such presumption. (*In re Nicholas H.* (2003) 112 Cal.App.4th 251, 267-268; see Welf. & Inst. Code, § 366.21, subd. (e).) Rather, the juvenile court must use the standard generally applicable to child custody decisions -- the best interests of the child. (*Nicholas H.*, at p. 268; *In re John W.* (1996) 41 Cal.App.4th 961, 973; see Welf. & Inst. Code, § 202, subd. (d); cf. Fam. Code, § 3040.) "[T]he parents' ability to protect and care for the child is the central issue." (*In re Jennifer R.* (1993) 14 Cal.App.4th 704, 712.) The mother concedes that the best-interests test applies.

"We review a juvenile court's custody placement orders under the abuse of discretion standard of review; the court is given wide discretion and its determination will not be disturbed absent a manifest showing of abuse. [Citations.] 'Broad deference must be shown to the trial judge. The reviewing court should interfere only "if we find that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that he did.'" [Citations.]" [Citation.]' [Citation.]" (*Alicia B. v. Superior Court* (2004) 116 Cal.App.4th 856, 863, quoting *In re Robert L.* (1993) 21 Cal.App.4th 1057, 1065, quoting *Smith v. Smith* (1969) 1 Cal.App.3d 952, 958.)

Here, both parents had successfully completed their reunification services plans. Neither of them really believed that Amen had molested the girls, but they both claimed they would obey a no-contact order. The psychological evaluations indicated that this was true. The juvenile court, however, found the mother not credible. In her letter, she denied having benefited at all from reunification services. She expressed faith in Amen and hostility toward the “system.”

The father had moved to Hemet “so he wouldn’t be under the daily influence of [Amen].” The mother, on the other hand, was still living amongst followers of Amen. Even the psychological evaluator questioned the mother’s judgment in this respect, “given that there are problems there, or these allegations would not have surfaced, true or not.” The father had been facilitating the girls’ attendance at Daughters United, at which they had been “consistent in their statements of sexual abuse.”⁴ By contrast, the mother complained that these classes had “sexualized” her daughters. The mother also said she did not know what she would do if the molestation allegations were true. Finally, she had, in fact, failed to protect the children from Amen.

The girls were reportedly happy living with the father. The mother complains that the girls were not asked where they would prefer to live. However, she (or minors’

⁴ The mother claims that the girls were not consistent. Glory never said she had been sexually abused; Joy did, but in subsequent interviews she recanted.

The evidence on which the mother relies, however, was not introduced at the six-month review hearing. Moreover, the Daughters United facilitator merely stated that the girls had been consistent *at Daughters United meetings*. It was surely significant that, in a familiar, therapeutic environment, the girls consistently stated that they had been sexually abused.

counsel) could have called them to testify. Because she did not, the report that they were happy with the father was uncontradicted. Clearly, they also missed the mother; the juvenile court, however, allowed the mother visitation with them. They had already been living under this arrangement for six months, without any apparent ill effects. Thus, the juvenile court could reasonably find that the children's best interests were better served by living with the father than with the mother.

In her reply brief, in a single sentence, the mother argues "[i]n the alternative" that the juvenile court erred by allowing her supervised visitation rather than unsupervised visitation. This argument was not plainly stated anywhere in her opening brief. (See *In re Ricky H.* (1992) 10 Cal.App.4th 552, 562 [appellate court will generally decline to consider questions not raised in opening brief].) In any event, she waived it by failing to raise it in the trial court. (*In re Anthony P.* (1995) 39 Cal.App.4th 635, 640-642.)

III

DISPOSITION

The order appealed from is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

HOLLENHORST
Acting P.J.

McKINSTER
J.